MAJU HOLDINGS SDN BHD

v.

KAMALA DEVI RAMADASS & ANOR

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD SAARI YUSOF JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEALS NO: W-02-459-2001 & W-02-460-2001]
29 NOVEMBER 2002

CIVIL PROCEDURE: *Subpoena - Setting aside - Subpoena Ad Testificandum and Duces Tecum - Examination of witness - Production of documents - Subpoena requiring witness to produce documents and testify on matters pertaining to account of bank's customer - Whether prohibited by statute - Whether to be refused - Banking and Financial Institutions Act 1989 ss. 97(1), 97(2) - Rules of High Court 1980 O. 38 r. 16(2) - Evidence Act 1950 ss. 130, 131, 162*

The appellant had entered into an agreement with the second respondent ('the agreement') for the purpose of acquiring shares in Ipmuda Berhad ('Ipmuda'). Subsequently, however, the appellant discovered that the shares did not belong to the second respondent, and on that score repudiated the agreement. The second respondent sued the appellant for breach of contract, wherefore the appellant, in an effort to resolve the issue of ownership of the shares, issued a Writ of Subpoena Ad Testificandum and Duces Tecum against the first respondent ('the subpoena') requiring that she testify in court and produce 'all the bank's documents, correspondence and books in connection with the shareholding in Ipmuda'. The first respondent refused to attend personally and was only willing to produce the information sought vide the bank's Form 29 documentation, and in the circumstances applied to set aside the subpoena. The application was allowed by the learned judge ruling that the disclosure of the information was prohibited by s. 97(1) of the Banking and Financial Institutions Act 1989 ('BAFIA'). The appellant appealed and before the learned appeal judges the primary issues that arose were: (i) whether the appellant could be allowed to examine the first respondent in court when the latter was prepared to release to the appellant the various Forms 29 in the manner set out in O. 38 r. 16(2) Rules of the High Court 1980 ('RHC'); and (ii) whether in the light of s. 97(1) BAFIA the first respondent could refuse to comply with the Writ of Subpoena Ad Testificandum herein.

Held:

Per Alauddin Mohd Sheriff JCA

[1] The various Forms 29 speak for themselves as to the beneficial ownership of the shares in Ipmuda and this information could readily be obtained by the appellant from the company secretary of Ipmuda. There is therefore no necessity on the part of the first respondent to comply with the Writ of Subpoena Duces Tecum. It would be sufficient for the first respondent to just produce the documents in compliance with O. 38 r. 16(2) of RHC. (p 441 d-h)

[2] The appellant may require the first Respondent to testify on what appears on the Forms 29 documents as that would not be in breach of the secrecy provision of s. 97(1) of BAFIA. The facts showed however that the appellant had wanted to examine not merely on that, but as to who is the beneficial owner of the 1,646,000 shares in Ipmuda. That is in breach of s. 97(1) of BAFIA. (p 443 a-b)

[3] Section 97(2) BAFIA only opens the way for admission of Forms 29 under the Writ of Subpoena Duces Tecum, but not of such testimony as would enable information relating to a particular customer of the bank to be ascertained from it. It must also be noted that the other exceptions to s. 97(1) BAFIA, namely ss. 98 and 99, are not applicable here. The first respondent, hence, is absolutely prohibited from giving oral testimony on matters relating to the accounts of a customer of the bank. (p 443 b-d)

[4] The learned trial judge does not have any discretionary power to allow disclosure of information if such information is prohibited under s. 97(1) BAFIA. In the absence of such discretionary power, it would be wrong for the appellant to suggest that s. 97(1) BAFIA affords a privilege to information and documents. (p 443 e)

[5] Forms 29 are prepared by Global Securities Services Department of the bank based on computer records of the bank. As such the first respondent is not in a position to give any evidence pertaining to such documents, and therefore not in a position to inform the court as to who the true beneficial owner of 1,646,000 shares in Ipmuda is if it was other than the person named in the Forms 29. Thus the evidence sought to be adduced by the first respondent is not the best evidence. (pp 443 h & 444 a)

[6] The issuance of the writ of subpoena is an abuse of process and the learned trial judge was absolutely correct in setting it aside. The learned judge was also correct in setting aside the writ considering that it was too wide and unlimited in scope and amounted to a fishing expedition. (p 445 a-d)

[Appeals dismissed]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu telah memeterai satu perjanjian dengan responden kedua ('perjanjian') bagi membeli saham-saham Ipmuda Berhad ('Ipmuda'). Perayu, bagaimanapun, kemudiannya telah membatalkan perjanjian apabila mendapati bahawa responden kedua bukanlah pemilik sebenar saham-saham tersebut. Responden kedua telah mendakwa perayu kerana kemungkiran, di mana perayu, dalam usaha untuk menyelesai isu kepemilikan saham-saham tersebut, telah mengeluarkan Writ Sapina Ad Testificandum dan Duces Tecum terhadap responden pertama ('sapina') memintanya memberi keterangan lisan di mahkamah dan mengemukakan 'semua dokumen, surat menyurat dan buku-buku bank berkenaan kepemilikan saham Ipmuda'. Responden pertama hanya bersedia untuk mengemukakan butiran yang diminta melalui dokumentasi Borang 29 tetapi tidak untuk hadir secara peribadi, dan dalam keadaan sedemikian, memohon supaya sapina dibatalkan. Permohonan dibenarkan oleh hakim yang bijaksana yang memutuskan secara intinya bahawa pendedahan maklumat seperti yang diminta perayu adalah dilarang oleh s. 97(1) Akta Bank dan Institusi Kewangan 1989 ('ABIK'). Perayu merayu dan di hadapan yang arif hakim-hakim rayuan isu-isu penting yang berbangkit ialah: (i) sama ada perayu masih boleh memeriksa responden pertama di mahkamah dalam keadaan di mana responden pertama bersedia mengemukakan Borang-Borang 29 menurut tatacara yang termaktub dalam A. 29 k. 16(2) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'); dan (ii) sama ada mengambilkira s. 97(1) ABIK responden pertama boleh enggan mematuhi Writ Sapina Ad Testificandum di sini.

Diputuskan:
Oleh Alauddin Mohd Sheriff HMR

[1] Borang-Borang 29 telah dengan sendirinya mendedahkan tentang kepemilikan benefisial saham-saham dalam Ipmuda dan maklumat ini boleh didapati dengan mudah oleh perayu dari setiausaha syarikat Ipmuda. Dengan yang demikian tiada keperluan bagi responden pertama mematuhi Writ Sapina Duces Tecum. Ianya memadai bagi responden pertama untuk hanya mengemukakan dokumen-dokumen menurut kehendak A. 38 k. 16(2) KMT.

[2] Perayu boleh meminta responden pertama untuk memberi keterangan tentang apa yang tertera pada Borang 29 kerana itu tidak menyalahi peruntukan kerahsian s. 97(1) ABIK. Fakta bagaimanapun menunjukkan bahawa perayu mahu memeriksa bukan setakat fakta tersebut sahaja, tetapi berhubung dengan kepemilikan benefisial 1,646,000 saham dalam Ipmuda. Ini menyanggahi s. 97(1) ABIK.

[3] Seksyen 97(2) ABIK hanya membenarkan kemasukan Borang 29 di bawah Writ Sapina Duces Tecum, tetapi tidak sesuatu testimoni yang akan mendedahkan maklumat berkaitan seseorang pelanggan bank. Harus juga diingat bahawa pengecualian-pengecualian lain kepada s. 97(1), yakni ss. 98 dan 99, tidak terlaksana di sini. Responden pertama, dengan itu, dilarang secara mutlak dari memberi apa-apa keterangan lisan bersangkutan akaun pelanggan-pelanggan bank.

[4] Hakim bicara yang bijaksana tidak mempunyai kuasa budibicara untuk membenarkan pendedahan maklumat sekiranya pendedahan tersebut dilarang oleh s. 97(1) ABIK. Dengan ketiadaan kuasa budibicara tersebut, ianya silap bagi perayu untuk menyatakan bahawa s. 97(1) ABIK memberikan keistimewaan dalam memperoleh maklumat dan dokumen.

[5] Borang 29 dikeluarkan oleh Jabatan Perkhidmatan Keselamatan Global bank berdasarkan kepada rekod komputer bank. Dengan demikian, responden pertama tidak berada dalam keadaan di mana beliau mampu memberi keterangan berkaitan dokumen-dokumen berkenaan, dan kerana itu juga tidak berkemampuan untuk memberitahu mahkamah tentang siapakah pemilik sebenar 1,646,000 saham-saham di dalam Ipmuda itu sekiranya pemilik tersebut adalah lain dari orang yang dinamakan di dalam Borang 29. Jelas bahawa keterangan yang diminta dari responden pertama bukanlah merupakan keterangan utama atau 'best evidence'.

[6] Pengeluaran writ sapina di sini adalah suatu penyalahgunaan proses dan hakim bicara yang bijaksana adalah betul bilamana beliau mengetepikannya. Hakim yang bijaksana juga betul dalam mengetepikan writ mengambilkira bahawa writ tersebut mempunyai ruang yang terlalu luas dan tidak terhad dan hanya merupakan satu ekpedisi memancing.

[Rayuan ditolak]

Case(s) referred to:
Chow Siew Who v. PP [1967] 1 MLJ 228 ***(refd)***
KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1 ***(refd)***
Tan Siew Sin v. Hasnul Abdul Hadi [1967] 2 MLJ 191 ***(refd)***
Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 4 CLJ 345 ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 97(1), (2)
Evidence Act 1950, ss. 130(3), 131, 162
Rules of the High Court 1980, O. 38 r. 16(2)

For the appellant - David Morais (Gurmel Singh & Khabir Dhilion); M/s Mohamad Illiyas & Co
For the 1st respondent - Lee Wooi Mien (Lai Wai Fong); M/s Shook Lin & Bok
For the 2nd respondent - Dato' VK Lingam (VK Lashmi); M/s VK Lingam & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D6-22-1635-1998]

Reported by WA Sharif

JUDGMENT

Alauddin Mohd Sheriff JCA:

Both these appeals are against the decision of the High Court, Kuala Lumpur given on 28 April 2001 which set aside two subpoenas *Ad Testificandum* and *Duces Tecum* ('the subpoenas') couched in similar terms issued against the following persons:

(i) In respect of Civil Appeal No. W-02-459-2001, against the first respondent ('Erdmann Vogt') by writ of subpoena dated 24 April 2001; and

(ii) In respect of Civil Appeal No. W-02-460-2001, against the first respondent ('Kamala Devi') by writ of subpoena dated 13 December 2000.

A brief account of the dispute between the appellant (Maju Holdings) and the second respondent (Fortune Wealth) is as follows:

The second respondent issued proceedings against the appellant for an alleged breach of a Call & Put Option Agreement ('the agreement') purportedly dated 1 April 1997. The agreement was intended as a means of financing the acquisition by the appellant of shares in Ipmuda Berhad ('the shares'). Under the agreement, the second respondent has the option during the option period to put to the appellant the shares at a predetermined price. It is the alleged failure by the appellant to pay for the 'put' shares that has given rise to this action. The appellant in its defence, *inter alia*, pleaded that the agreement had been repudiated when it had exercised its common law option to avoid the same upon discovery that the second respondent was merely a nominee of one Koh Kim Teck. This common law right exists as at all material times Koh Kim Teck was an agent of the appellant to arrange the financing of the transaction through the agreement but did not at any time disclose to the appellant his beneficial interest in the shares. In short the appellant says that Koh Kim Teck and not the second respondent was the beneficial owner of the shares. Under the law, he ought to have disclosed that beneficial interest. His beneficial interest was further put squarely into issue during the cross-examination of PW1, one Miss Loke Foong Meng.

At the hearing before the High Court, the second respondent after having led evidence through PW1 and PW2 intimated to the court that they were closing their case. It was at this juncture that the appellant took out the subpoenas against the first respondents. The subpoenas were served on Kamala Devi on 15 December 2000 and Erdmann Vogt on 24 April 2001. By the said subpoenas both the first respondents were ordered to attend hearing on a certain date and so from day to day until the end of the proceedings 'to give evidence for the defendant' and to produce 'all documents, correspondences and books in connection with the shareholding in Ipmuda Berhad by Koh Kim Teck, Fortune Wealth (Hong Kong) Limited and/or the bank from the month of March 1997 until now'.

Both the first respondents took out separate summonses to have the said subpoenas struck off on the grounds:

(i) that the said subpoenas on the face of it are too wide and unlimited in that they are asking the witnesses to produce all documents, correspondences, books and other statements relating to the shareholdings of one Mr. Koh Kim Teck in Ipmuda Berhad; and which information was in fact readily and presently available to the appellants through Ipmuda's company secretary, the company in which the appellant itself has a substantial shareholding and sharing a common Chairman in the person of Tan Sri Abdul Sahid Muhamad.

(ii) that the issuance of these subpoenas were made in futility by the appellants 'on a fishing expedition. It was an attempt to discovery of documents from parties who are not even parties to these proceedings; and the call under the subpoenas is an abuse of the process of court and should be set aside.

(iii) thirdly, and most important of all is s. 97(1) of the Banking and Financial Institutions Act 1989 ('BAFIA'). BAFIA is an Act specifically passed to regulate the business and affairs of the Banking Industry and s. 97(1) contains a restriction against any disclosure of information pertaining to the affairs or account of the bank's customers.

Having heard and considered the arguments put forward by both sides the learned judge of the High Court allowed the applications by the first respondents and set aside the subpoenas. Hence the present appeals. As the issues, parties and counsel in both these appeals were similar we proceeded to hear them together. However for the purpose of this judgment we would only confine ourselves to Civil Appeal No. W-02-460-2001. The parties have agreed that the decision in this appeal would bind them in the other.

Before us the decision of the learned judge was attacked on the following grounds:

1. That the learned judge erred in holding that the first respondents could not be compelled by subpoena to testify as to the production of documents and orally under the provisions of ss. 130 and 131 of the Evidence Act 1950 read together with s. 97(1) of BAFIA and in so doing failed to appreciate that the privilege under s. 97(1) of BAFIA did not apply to the information and documents sought from the first respondent under the provisions of s. 97(2) of BAFIA;

2. That the learned judge erred in failing to consider or sufficiently consider the following factors:

   2.1 That the evidence sought to be adduced from the first respondent is directly relevant to the facts in issue, particularly as to the beneficial ownership of 1,646,000 shares of Ipmuda Berhad held on trust by DB (Malaysia) Nominee (Tempatan) Sdn. Bhd, a wholly owned subsidiary of Deutsche Bank (Malaysia) Berhad;

   2.2 That the relevance of the first respondent's evidence is particularly important given that she is the maker or the person having charge of the making of substantial number of the documents sought to be adduced;

   2.3 That the application is improper or otherwise premature as any objection on the admissibility or production of the evidence ought properly be taken during the examination of the first respondent pursuant to s. 162 of the Evidence Act 1950 and the proper practice and procedure of court;

   2.4 That s. 130(3) of the Evidence Act 1950 does not apply in the present circumstances as the documents subpoenaed are not 'bankers books' as defined in s. 2 of the Bankers' Books (Evidence) Act 1949; and

   2.5 That the first respondent cannot rely on s. 97(1) of BAFIA as the documents subpoenaed fall within the exception in s. 97(2) of BAFIA 1989.

3. That in all the circumstances of the case the learned judge erred in setting aside the writ of subpoena *Ad Testificandum* and *Duces Tecum* dated 13 December 2000 issued against the 1st respondent.

Subpoena Duces Tecum

We shall begin by first considering the writ of *Subpoena Duces Tecum*. Order 38 r. 16(2) of the Rules of the High Court 1980 (RHC 1980) provides as follows:

> 16 writ of *subpoena duces tecum* (O. 38 r. 16)
>
> (1) A writ of subpoena duces tecum must contain the name of one person only.
>
> (2) Any person served with a writ of *subpoena duces tecum* shall sufficiently comply if he causes the document to be produced without attending personally.

From the Appeal Record, at p. 161, it appears obvious to us that the first respondent was prepared to release to the appellant the various Forms 29 in the manner set out in O. 38 r. 16(2) RHC 1980 referred to above. The various Forms 29 speak for themselves as to the beneficial ownership of the shares in Ipmuda Berhad which information was required by the appellants. But the appellant was not satisfied with the first respondent merely complying with O. 38 r. 16(2) RHC 1980. They wanted to examine her in court. On the facts of the present case we hold that it would be sufficient for the first respondent to just produce the documents in compliance with O. 38 r. 16(2) RHC 1980. That in itself would satisfy the appellant's request.

Next, s. 97(1) of BAFIA contains an absolute prohibition on the director or any officer of the bank from producing, revealing or disclosing to any person any information or document whatsoever relating to the affairs or account of thg customer. However, as suggested by the appellant, the documents sought to be produced here are not those prohibited by s. 97(1). As a matter of fact they come within the exception under sub-s. 2 of s. 97 which provides:

> (2) This section shall not apply to information or document which at the time of disclosure is, or has already been made, lawfully available to the public from any source other than the licensed institution, or to any information which is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular licensed institution or any particular customer of the licensed institution to be ascertained from it.

As we have mentioned a moment ago the various Forms 29 speak for themselves as to the beneficial ownership of the shares in Ipmuda and this information could readily be obtained by the appellant from the company secretary of Ipmuda. So for this reason we find that there is really no necessity on the part of the first respondent to comply with the writ of *Subpoena Duces Tecum.*

Following from the above the only other issue for our consideration in this appeal is whether the first respondent has to comply with the writ of *Subpoena Ad Testificandum* to give oral testimony with regard to the documents sought to be adduced in evidence by the appellant in the light of s. 97(1) BAFIA 1989.

Subpoena Ad Testificandum

Touching upon the court's jurisdiction to set aside a writ of Subpoena Ad Testificandum, we can do no better than to refer to the decision of the then Supreme Court in *Wong Sin Chong & Anor v. Bhagwan Singh & Anor* [1993] 4 CLJ 345 (at p. 349) where the court, speaking through that eminent judge Mohamed Azmi SCJ (as he then was) had this to say:

> The right of a party to the attendance of witnesses is a crucial part of our judicial system, but the right must be protected against any oppression or abuse. Thus in *Raymond v. Tapson*[1], it was held that any party may, without leave of the court, issue a subpoena for the examination of a witness at any stage of an action; but the court will exercise a control over the privilege to prevent it being oppressively used. In that case, the plaintiff had subpoenaed a solicitor, who had acted for both parties in a mortgage transaction, in order to examine him with respect to the moneys received by him on account of both parties. The court held that the plaintiff was entitled to issue the subpoena and to examine the witness. But, where no useful result would be obtained by the attendance of a witness, the subpoena should be refused – see *Re Mundell, Fenton v. Cumberlege*[2]. At p. 452, *Mallal's Supreme Court Practice* (2nd edn), citing *Raymond v. Tapson*[1] as authority, it is stated that:
>
> > An oppressive subpoena (for purposes of annoyance, or in spite, to a man's wife or unmarried daughters and the like) will be set aside by the court, on application on behalf of the witness, as being an abuse of the party's privilege to issue a subpoena without leave.
>
> It is further stated at p. 453 that:
>
> > The court has inherent jurisdiction to set aside a subpoena which is issued from an improper motive and not for obtaining relevant evidence, and there is no distinction, on the point, between civil and criminal proceedings: *R v. Baines* [1909] 1 KB 258.

Now, coming back to the present appeal before us and in answer to the appellant's grounds of appeal we would say this. If the appellant merely requires the first respondent to testify on what appears on the face of the said documents, then the first respondent may do so without breaching the secrecy provision of s. 97(1) BAFIA 1989. But this is not the case here. Here, the appellant as stated at p. 162 of the Appeal Record, wanted to examine the

first respondent as to who is the beneficial owner of 1,646,000 shares in Ipmuda Berhad and not merely what appears on the face of the Forms 29. They wanted the first respondent to testify on matters beyond what appears on the face of the documents.

This in our view would clearly be in breach of s. 97(1) BAFIA 1989. The appellant's contention is that s. 97(2) permits such evidence to be given. With due respect to the appellant we must say that their contention is totally misconceived because the testimony so required of the first respondent goes far beyond what appears on the face of the documents ie, Forms 29, in that such testimony would enable information relating to a particular customer of the bank to be ascertained from it. Certainly, both ss. 97(1) and (2) BAFIA prohibit this. Section 97(2) only opens the way for admission of Forms 29 under the writ of *Subpoena Duces Tecum*.

Further, we find that the other exceptions to s. 97(1) BAFIA, namely ss. 98 and 99 are also not applicable on the facts of the present appeal. In the circumstances, the first respondent is absolutely prohibited from giving oral testimony on matters relating to the accounts of a customer of the bank. We may add that such being the situation the learned judge does not have any discretionary power to allow disclosure of information if such information is prohibited under s. 97(1) BAFIA 1989. In the absence of such discretionary power on the part of the learned judge it would be wrong for the appellant to suggest that s. 97(1) BAFIA 1989 affords a privilege to information and documents as mentioned in their grounds of appeal.

Next, it is the appellant's contention that the learned judge had failed to consider or sufficiently consider the various factors mentioned in para 2.1 to 2.5 of their grounds of appeal. In our judgment such failure on the part of the learned judge would not have in any way affected his decision for the following reasons:

1. Notwithstanding the relevancy of the evidence sought to be produced through the first respondent, this must necessarily be subjected to any statutory prohibition as to its admissibility.

2. Further, the first respondent is not the maker of the documents sought to be produced. The various Forms 29 are prepared by Global Securities Services Department of the bank based on the computer records of the bank. As such, the first respondent is not in a position to give any evidence and/or relevant evidence pertaining to such documents and is therefore, not in a position to inform the court who the true beneficial owner of 1,646,000 shares in Ipmuda Berhad if it was other than the person mentioned in the Forms 29. Thus, the evidence sought to be adduced through the first

respondent is not the best evidence. (See *Tan Siew Sin v. Hasnul bin Abdul Hadi* [1967] 2 MLJ 191; *KPM Khidmat Sdn. Bhd v. Tey Kim Suie* [1994] 3 CLJ 1; *Chow Siew Who v. Public Prosecutor* [1967] 1 MLJ 228).

3. On the facts of the present appeal, we would say that the persons who are in a better position to testify as to the facts sought by the appellant would be the company secretary of Ipmuda Berhad who would be in possession of the records of its members and their shareholding in Ipmuda Berhad and/or the said Koh Kim Teck himself (the person who appears from the Forms 29 as the beneficial owner of the shares). We notice, at p. 176 of the Appeal Record, that the appellant had conceded that the said Koh Kim Teck was not called as their witness for fear that he would be a hostile witness. Be that as it may, this does not in any way detract from the fact that the said Koh Kim Teck is the best person to testify on matters sought to be adduced through the first respondent.

4. From the wordings of s. 162 of the Evidence Act 1950 it appears to apply only to the production of documents and not to the giving of oral testimony by a witness. Hence the appellant's contention in respect of this aspect of the said section is again misconceived. We hasten to add that the learned judge need not give any regard to this provision but need only consider s. 97(1) BAFIA 1989 in determining whether the first respondent ought to be subpoenaed as a witness to testify on matters relating to an account of a customer of the bank where the bank is not a party to the proceedings. Since the first respondent is absolutely prohibited from testifying on such matters we would view the issuance of the said writ of subpoena as an abuse of the process of court. In consequence, the learned trial judge was therefore absolutely correct in setting aside the writ of subpoena.

5. The appellant contends that as the documents subpoenaed are not "bankers' books" as defined in s. 2 of the Banker's Books (Evidence) Act 1949, s. 130(3) of the Evidence Act 1950 has no application in the present circumstances.

It must be observed that under the definition, all books relating to the bank's business would be covered under these terms. Further, a proper reading of s. 130(3) of the Evidence Act 1950 which stipulates that 'no bank shall be compelled to produce its books in any legal proceeding to which it is not a party' can only lead to the conclusion that bankers cannot be made to divulge any of its books. The bank here is not a party to these proceedings. Once again the appellant has fallen into the error of misconceiving the entire provision.

Lastly in reply to the appellant's final ground of appeal we would say that the learned judge was correct and justified in setting aside the writ of subpoena issued against the first respondent. His Lordship had taken into consideration the following factors:

(i) that the said writ of subpoena was too wide and unlimited in its scope on the face of it so as to amount to a fishing expedition; and

(ii) that the appellant was not contented with the production of the said documents by the first respondent in the manner set out under O. 38 r. 16(2)RHC 1980.

Before we conclude we would observe that in the context of the present appeal the issuance of the writs of subpoena by the appellant to the first respondent is not made *bona fide* for the purpose of obtaining relevant evidence. For that reason we find that it amounts to an abuse of the process of court and is oppressive. The learned judge was therefore entitled to set aside the writs of subpoena.

For the reasons we have already given above we find that these appeals cannot succeed. We therefore dismiss them with costs to the first respondent on a higher scale. We would order that the deposit be paid to the first respondent towards account of taxed costs. We order no costs against the appellant in respect of the second respondent.

My learned brothers Mokhtar bin Haji Sidin and Mohd. Saari bin Yusoff JJCA had seen this judgment in draft and had expressed their agreement with it.